PUBLIC PROSECUTOR

v.

LEO SAY & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[CRIMINAL TRIAL NOS. 6 & 8 OF 1982]
26 JANUARY 1985

CRIMINAL LAW AND PROCEDURE: *Charge under s. 3 of Firearms (Increased Penalties) Act - Amended to s. 304 of the Penal Code - Section 3 and s. 304 distinguished - Sentencing - Factors of mitigation - Plea of guilty - No previous criminal record - Financial hardship - Crime of serious nature - Effect.*

In the present case, a firearm was discharged by the 1st accused in an attempt to commit robbery with the result that the manager of Kundang Estate met his death. All the 3 accused persons were arrested and charged under the Firearms (Increased Penalties) Act 1971 ("the Act"). The 1st accused was charged under s. 3, the 3rd accused for abetting him and the 2nd accused under s. 3A of the Act. These offences carry the mandatory death sentence. The charges were later on amended to one under s. 304 of the Penal Code with the result that they are now not faced with the death sentence.

All the 3 accused persons pleaded guilty to the charge and pleaded for leniency on the ground that they have aged parents and families to look after and also that the 2nd and 3rd accused had no previous criminal records.

Held:

[1] The phrase "with the intention of causing such bodily injury as is **likely to cause death"** in s. 304 of the Penal Code requires a greater degree of intention than the phrase "with intent **to cause hurt** to any person" in s. 3 of the Act. In so far as the present accused persons are concerned, if they are guilty of the offence under s. 304 of the Penal Code, then, *a fortiori*, so will they be guilty of the offence under s. 3 or s. 3A (as the case may be) of the Act had they been charged under that Act.

[2] The fact that a man has not much of a criminal record or none at all, is not a powerful factor to be taken into consideration in a case of such gravity.

[3] Although all the 3 accused persons pleaded guilty and they are entitled to some credit for that, it must be set off against the enormity and seriousness of the crime that they have committed.

[4] As for the plea that they have aged parents and families to look after, hardship to families is not a matter which in the ordinary way the Court can take into consideration by way of reducing sentence.

[5] All the 3 accused persons were sentenced to 20 years' imprisonment each so that the sentences would act as a warning to others not to take part in similar offences.

[All 3 accused sentenced to 20 years' imprisonment each. Sentences to run from date of arrest.]

Cases referred to:
Reg. v. Turner [1975] 61 Cr App R 67
Reg. v. Davies [1978] 67 Cr App R 207
Warnink v. Townend & Sons [1979] AC 731

Legislation referred to:
Firearms (Increased Penalties) Act 1971, ss. 3, 3A
Penal Code, ss. 304, 394

For the public prosecutor - Amelia Tee Hong Geok, FC
For the 1st accused - Y.N. Ngeow; *M/s. Ngeow & Co.*
For the 2nd accused - G.F. Nelson; *M/s. G.F. Nelson & Co.*
For the 3rd accused - Jeffrey Fernandez (K. Ramakrishnan with him); *M/s. Fernandez & Co.*

JUDGMENT

NH Chan J:

On 6 January 1982, at about 3 o'clock in the afternoon, the manager of Kundang Estate, Rawang, the late Mr. Gan Song, went to the Malayan Bank in Rawang to cash a cheque for RM23,115.14. The money was the payroll for the workers of the estate. On his way back to the estate, at the 5-¾ mile Rawang to Kundang road, he was confronted by two men on a motorcycle. Sensing that something was wrong, he did not stop his motorcar. The men gave chase and when their machine drew alongside the motorcar, the pillion rider fired a number of shots at Mr. Gan Song. Still the mortally wounded man refused to stop. Further attempts to overtake the motorcar were unsuccessful because the motorcycle was an old one and not fast enough. As they neared the estate, the pursuers gave up the chase and turned back. The rider of the motorcycle was Chai Min and the man with gun was Leo Say. Mr. Gan Song lost control of his vehicle. He crashed and ended up in a swamp within sight of the estate office. The workers rushed to his aid and took him to Eng Klinik in Rawang. He was then rushed to the General Hospital, Kuala Lumpur. Sadly, this brave man succumbed to his injuries. He died soon after reaching the hospital.

An autopsy by Dr. Joko Suko Haryano on 7 January 1982 revealed that the deceased died from multiple gunshot wounds in his face and abdomen. Among his injuries were:

(i) A gunshot wound in the right upper jaw measuring 1 cm. in diameter. A bullet was recovered from the left upper jaw beneath the skin.

(ii) A bullet tract from the abdomen going upwards destroying the lungs and rib No. 5 with the bullet lodged in the left axilla. There was bleeding in the left chest.

(iii) A gunshot wound in the right abdomen measuring 1 cm. in diameter. The bullet had penetrated the liver, intestines and stomach. There was evidence of bleeding in the stomach.

The cause of death was shock due to internal bleeding caused by gunshot wounds.

Krishnamoorthy s/o Ramasamy was a police officer. He was at the time a special branch probationary inspector attached to Rawang Police Station. It was in Rawang that he conceived the idea of robbing the Kundang Estate payroll. He had, as his Counsel Mr. Fernandez has told us, fallen heavily into debt. He wanted to get some money out of a robbery at Kundang Estate but was not himself minded to take part. As a result, he started to look around, at first in the Kundang/Rawang area, for people who were willing to carry out the robbery but he was unsuccessful. He was compelled, therefore, to look further afield. In the disreputable

circles in which he moved, he met Manoharan s/o Rajagopal who was prepared to help him look for recruits to carry out the robbery. Now, Manoharan has brothers living in Senai, Johore. As a result, Krishnamoorthy, Manoharan and another person, Ramakrishnan alias Naidu s/o Ramaya set out for Senai on 4 January 1982. There, through the introduction of Manoharan's brothers, they met Leo Say and Chai Min. The outcome was that these two men were willing to carry out the robbery.

Krishnamoorthy brought these men back to Rawang. They reached Rawang at about 10 p.m. that evening and Krishnamoorthy put them up at his rented house at Taman Garing. That night, Krishnamoorthy slept in another house - the house of his wife's parents at Rawang Tin Field.

During the days prior to 6 January 1982, Krishnamoorthy had been to Kundang Estate many times to ask about when the workers would be paid. Krishnamoorthy also took Leo Say and Chai Min to Kundang Estate. He showed them the spot where they were to wait in ambush for the estate manager when he comes round with the workers' salaries. He gave them the description, colour and registration number of the estate manager's motorcar. On the day of the robbery he borrowed a motorcycle from Christopher Gomez for Leo Say and Chai Min to use. At about noon of that day he handed his gun to Leo Say and taught both the men how to use the weapon.

There is no doubt that Krishnamoorthy was the ringleader and the originator of the plan to rob Mr. Gan Song. Later, he was arrested in Rawang. Both Leo Say and Chai Min were subsequently arrested in Johore Bahru. At first, all three were charged with offences under the Firearms (Increased Penalties) Act 1971. Leo Say under s. 3, Krishnamoorthy for abetting him and Chai Min under s. 3A of the Act. These offences carry the mandatory death sentence.

The trial was set to begin last Monday, that is 21 January. However, an adjournment was sought by Counsel to put off the hearing until the next day so that the charges against the three could be amended to one under s. 304 of the Penal Code with the result that they are not now faced with the death sentence. Nevertheless, the nature and gravity of the crime remain the same. It is only the penalty that has been altered. In the present case, a firearm was discharged in an attempt to commit robbery with the result that the manager of Kundang Estate met his death.

The offence is made out under s. 3 of the Firearms (Increased Penalties) Act when Leo Say - to use the language of the section - "discharges the firearm **with intent to cause** death or **hurt to any person."** Likewise, the offence is equally made out under s. 304 of the Penal Code, "if the act by which the death is caused" - when Leo Say discharged the firearm - "is done **with the intention** of causing death, or **of causing such bodily injury as is likely to cause death."**

I have purposely emphasised the words in the two types of offences to show the distinction between the quality of the intention that has to be proved in the present case. The phrase "with the intention of causing such bodily injury as is **likely to cause death"** in s. 304 of the Penal Code requires a greater degree of intention than the phrase "with intent **to cause hurt** to any person" in s. 3 of the Firearms (Increased Penalties) Act. What I am trying to say is this: in so far as the present accused persons are concerned, if they are guilty of the offence under s. 304 of the Penal Code, then *a fortiori*, so will they be guilty of the offence under s. 3 or 3A (as the case may be) of the Firearms (Increased Penalties) Act had they been charged under that Act. The phrase used in the amended charge against them is "with the intention of causing such bodily injury as is likely to cause death."

On Tuesday, 22 January 1985, the charges against them - in the case of Leo Say under s. 3. Krishnamoorthy for abetting him and in the case of Chai Min under s. 3A of the Firearms (Increased Penalties) Act - were amended to that under s. 304 of the Penal Code (first limb); Leo Say under the section and Chai Min and Krishnamoorthy for abetment.

The three of them pleaded guilty and admitted the facts which I have heretofore adverted to.

What is the appropriate penalty? In *Reg. v. Turner* [1975] 61 Cr App R 67, at p. 91, I find Lawton LJ saying this:

> What then is the appropriate kind of penalty for bank robberies of the kind which we are concerned in this case? In all the robberies we have had to consider, firearms and ammonia squirters were carried; and in some of the robberies firearms were discharged, usually for the purpose of frightening bank employees but sometimes for the purpose of blowing locks off doors and tills. In one case, with which none of the present appellants can be identified, a man received a gunshot wound in his hand. In another case a girl cashier who attempted to ring the alarm bell was kicked in the head. But, in general, violence was not inflicted on any bank employee, although in all the cases violence was threatened.

The Judge concluded:

> that the normal sentence for anyone taking part in a bank robbery or in the hold-up of security or a Post Office van, should be 15 years if firearms were carried and no serious injury done. It follows therefore that the starting point for considering all these cases is a sentence of 15 years.

That seems to be the view of the English Courts. I am not saying that I should follow them. The Judge then went on to say, and this in my view is as much applicable to the present case, the following words: -

> ... the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the Court is dealing with cases of this gravity ... We have decided that in dealing with those for whom a sentence of 15 year's imprisonment for one bank robbery is appropriate, the length and type of record is of little assistance.

I refer to this passage because I have in mind Chai Min and Krishnamoorthy who have no previous criminal record. As was said by Lawton LJ, when we are dealing with cases of this gravity the fact that a man has not much of a criminal record, or none at all, it not a powerful factor to be taken into consideration.

As I have said earlier, all three pleaded guilty. Although they are entitled to some credit for that, it must be set off against the enormity and seriousness of the crime that they have committed. As a result of what they have done, a defenceless man was killed in cold blood. In the case of Krishnamoorthy, it must be set off against the far more serious matter that he was the leader and the originator of the scheme.

As for the plea that they have aged parents and families to look after, all I can say is that they have brought all this hardship on themselves and to their families. If they were really concerned about their plight then they should have thought of them before they embarked on this criminal enterprise.

"We have had to say in this Court time and time again in the past that hardship to families is not a matter which in the ordinary way we can take into consideration by way of reducing sentence." - said Lawton LJ in *Reg. v. Davies* [1978] 67 Cr App R 207, 209.

What is the proper penalty? Counsel for the accused persons have urged on me that the maximum penalty is reserved for the worst cases. I agree. Can anything be worse than the commission of a crime which the legislature has seen fit to impose the ultimate penalty? Had they been charged under s. 3 or 3A (as the case may be) of the Firearms (Increased Penalties) Act and found guilty they would be sentenced to death. The facts of what they have done, and which they have admitted, fall squarely within the scope of ss. 3 and 3A of the Act. They would also fall as easily within the ambit of s. 304 of the Penal Code. For that matter, the same facts would, as much, be within the range of s. 394 of the Penal Code.

I find this passage from the speech of Lord Diplock in *Warnink v. Townend & Sons* [1979] AC 731, 743 interesting and, I think, appropriate. This is what he said with regard to the development of the common law in relation to the views of Parliament as to what the public interest demands in a particular field of law:

> Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.

Likewise, in the case of sentencing policy, the sentencing Court ought to proceed upon a parallel rather than a diverging course with the trend in legislation which reflects the view of Parliament as to what the public interest demands in a particular field of law. The increasing recognition by Parliament of the need for imposing severe penalties for certain type of offences is a factor which should not be overlooked by a Judge.

I would be failing in my duty if I do not pass sentences which make it absolutely plain that those who indulge in such conduct do receive sentences of the utmost severity. The sentences should act as a warning to others not to take part in similar offences. Such conduct should not only be held in utter abhorrence by all ordinary men and women, but should receive, when brought to justice, the severest possible punishment.

Loe Say who has one previous conviction for armed robbery in 1977, I sentence him to 20 years' imprisonment. Krishnamoorthy, because he was the leader and originator of the scheme and who allowed his gun to be used in the robbery, I sentence him to 20 years' imprisonment. As for Chai Min, he was the rider of the motorcycle. He was the person who was in charge of the "getaway vehicle". He could not say now that he was not aware that the gun was going to be carried. In fact, he was also taught how to use the gun by Krishnamoorthy. Despite the shooting, he still tried to overtake the motorcar. As pointed out earlier, if he had been charged under s. 3A of the Firearms (Increased Penalties) Act, he would have received the death sentence. He is as much involved in the crime as Leo Say and Krishnamoorthy. I sentence him to 20 years' imprisonment.

The sentences are to run from the date of their arrest.

Also found at [1985] 2 CLJ 155